No. 1369

IN THE

Supreme Court of the United States

October Term, 1946

INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS,

Petitioners,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor, et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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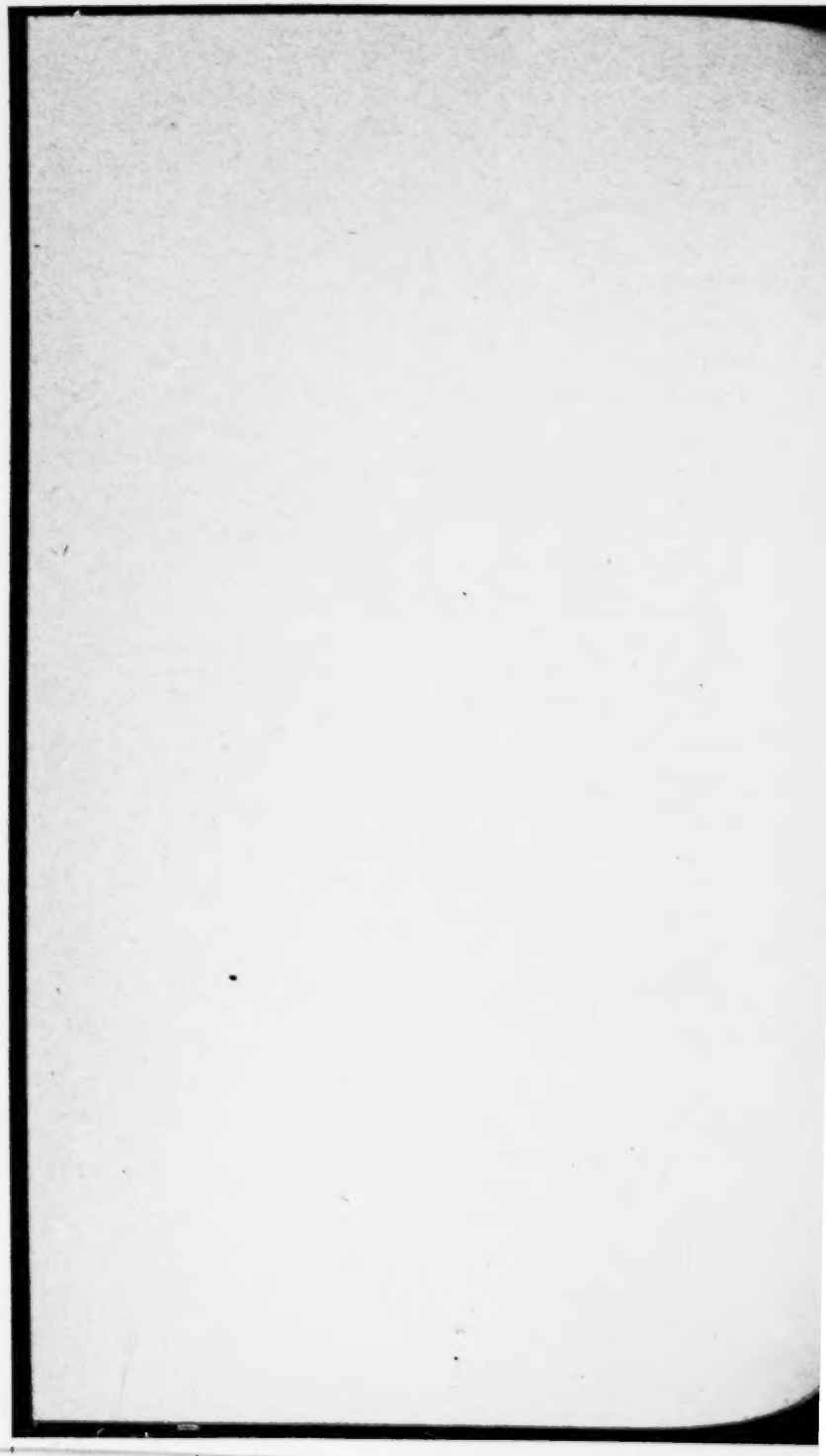

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NOTE ON THE RECORD AND REFERENCES THERETO

The record for the proceeding is based on stipulation (Stip. R., No. 35, p. 123) of the parties to the proceeding in the Circuit Court of Appeals below (except parties appellant not seeking certiorari), and consists in substance of the following:

(1) ***Stipulation*** volumes, containing opinions, reports and other basic documents newly assembled from the I.C.C., District Court and Circuit Court of Appeals record of the proceedings in the matter of the reorganization of New York, New Haven & Hartford Railroad Company and Old Colony Railroad Company and bound for the convenience of this Court, as stipulated for the purposes of this Petition and of the petition of The Protective Committee for Bonds of Old Colony Railroad Company to be filed with this Court.

(2) *C.C.A. Record* for this proceeding in Circuit Court of Appeals for the Second Circuit ..... F. 2d. ..... (decided January 13, 1947).

(3) *Prior Supreme Court Record,* filed in connection with *Massachusetts* v. *New York, New Haven & Hartford Railroad Company,* cert. denied, 325 U. S. 884, 89 L. ed. 1999 (June 18, 1945).

(Reference may also be made to the printed record in the reorganization proceedings of the District Court for the District of Connecticut.)

References in this Petition will use abbreviated designations of the parts of the record referred to, as follows:

(1) Stipulation volumes	Stip. R.
(2) C.C.A. Record from Court below	C.C.A.R.
(3) Prior Supreme Court Record.....	Prior S.C.R.
(4) District Court Record, generally....	D. R.

Parts referred to will be more specifically designated by volume numbers (A, B, or I, II, etc.) and Exhibit numbers, as appropriate, and by page numbers used in such volumes or Exhibits.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Institutional Group Committee for Boston Terminal Company Bonds respectfully prays that a writ of certiorari issue to review an order of the United States Circuit Court of Appeals for the Second Circuit entered on January 13, 1947,[1] affirming (1) an order of the District Court of the United States for the District of Connecticut dated September 6, 1945[2] reinstating the order of that court of March 6, 1944[3] which had approved a plan of reorganization, and (2) an order of said District Court dated September 6, 1945[4] confirming a plan of reorganization, for The New York, New Haven and Hartford Railroad Company, Principal Debtor, and certain of its subsidiaries, in proceedings instituted on October 23, 1935 under Section 77 of the National Bankruptcy Act.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is not yet reported except in CCH Bankruptcy Law Service at Paragraph 55,813. An earlier opinion of the Circuit Court of Appeals, relevant in some respects, is reported in 147 Fed. 2d 40 (January 2, 1945).

The memorandum decision[5] of the District Court on the approval and confirmation of the Sixth Plan (the present plan) is not reported. Earlier reported opinions of the District Court are in 54 Fed. Supp. 595 (approving the Fourth Plan), and 54 Fed. Supp. 631 (approving the Fifth Plan).

The reports of the Interstate Commerce Commission are reported as follows: Third Supplemental Report, 254 I. C.

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[1]Stip. R., No. 15, p. 12,655.
[2]Stip. R., No. 12, p. 11,922.
[3]Stip. R., No. 21, p. 11.
[4]Stip. R., No. 13, p. 11,924.
[5]Stip. R., No. 11, p. 11,891.

C. 63 (October 6, 1942); Fourth Supplemental Report, 254 I.C.C. 405 (July 13, 1943); Fifth Supplemental Report, 257 I.C.C. 9 (February 8, 1944); and Sixth Supplemental Report, 261 I.C.C. 195 (May 14, 1945).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925 (28 U.S.C., Section 347 (a)), and Section 24(c) of the National Bankruptcy Act (11 U.S.C., Section 47(c)). The order of the Circuit Court of Appeals for the Second Circuit was entered on January 13, 1947.[1] The order of this Court, extending the time for filing petitions for writs of certiorari to May 15, 1947, was entered April 1, 1947.[2]

STATUTES INVOLVED

The statutes involved are the National Bankruptcy Act, particularly Section 77 and Section 57(d) thereof (11 U.S.C., Sections 205 and 93(d)), and an Act of the Legislature of Massachusetts (Massachusetts Acts and Resolves, 1896, Chapter 516).[3]

QUESTIONS PRESENTED

I. Whether Section 57(d) of the Bankruptcy Act, dealing with the disallowance of certain unliquidated claims in ordinary bankruptcy, may lawfully be applied to a reorganization proceeding under Section 77, with the result that a valid but unliquidated contingent claim is disallowed and the holders thereof denied the right to vote on the plan of

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[1]Stip. R., No. 15, p. 12,655.
[2]Stip. R., No. 32, p. 117.
[3]The relevant provisions of the Massachusetts Act are copied in Appendix A hereto.

reorganization which purports to discharge the claim.

II. Whether, under Section 77, the holders of an unliquidated contingent claim, the validity of which is admitted, and which is dealt with and sought to be discharged by a plan of reorganization, may lawfully be denied the right to prove the claim and have it allowed, and the consequent right to vote on the plan and participate with other creditors in shaping the reorganization.

And in this connection,

(1) Whether, in view of the record, the claim has not in effect been allowed in its full amount.

(2) Whether, as a matter of law, the claim should not have been allowed.

(3) Whether the court below erred in finding that "undue delay" would result if liquidation of the claim were permitted, and that the claim, being unliquidated, must therefore be disallowed.

(4) Whether the holders of the claim, which arises from an agreement of indemnity pursuant to which the bankrupt debtor has agreed to "pay any deficiency" on foreclosure of outside security, may lawfully be denied the right to prove the full amount of the claim against the bankrupt debtor without first liquidating the amount of the deficiency by recourse to the outside security.

III. Whether a creditor, whose position is analogous to that of a claimant under an executory contract or unexpired lease which has been rejected by a plan, may lawfully be denied the right to vote on the plan by the device of inclusion therein of an "offer" of new terms, the making of which is postponed until *after* confirmation of the plan.

IV. Whether a bankruptcy court in a Section 77 pro-

ceeding has the power to modify or abrogate by a plan of reorganization provisions of a State statute, passed in the exercise of the police power, imposing continuing obligations upon the debtor railroads.

STATEMENT

This case involves two claims arising in bankruptcy proceedings of the New York, New Haven and Hartford Railroad Company, Principal Debtor, and Old Colony Railroad Company, Subsidiary Debtor (herein sometimes called the "debtor railroads") under Section 77 of the Bankruptcy Act. These claims are: (1) a claim by the bondholders of the Boston Terminal Company for a deficiency on their bonds (sometimes called the "bondholders' claim"); and (2) a claim by the bankruptcy trustee of the Boston Terminal Company for breach by the debtor railroads of their obligation to pay the operating expenses, including bond interest, of the Terminal Company (sometimes called the "Terminal Trustee's claim"). Both claims arise from obligations imposed upon the debtor railroads by an Act of the Massachusetts Legislature.

The claims in question, although unliquidated, are conceded to be valid; they are dealt with in the plan of reorganization and are sought to be discharged thereby. Yet neither claim was held to be "allowable" in this proceeding, with the result that the holders thereof were denied the rights prescribed by the Act for the protection of creditors, including the right to participate in shaping the plan of reorganization, the right to vote on the plan, and, in event of rejection thereof, the right to a hearing on the reasonableness of the rejection. The denial of these rights, and the reasons assigned therefor by the court below, raise novel questions of general interest and importance in both railroad and corporate reorganization proceedings.

1. *The Claims of the Terminal Interests.* Petitioners are a committee representing bondholders of the Boston Terminal Company. Of the two claims here involved, these bondholders are direct beneficiaries of the one (the bondholders' claim) and indirect beneficiaries of the other (the Terminal Trustee's claim).

The Terminal Company was incorporated in 1896 by special act of the Massachusetts Legislature to provide a union terminal for five using railroads, namely, the New Haven, Old Colony, New England, Boston and Providence and Boston and Albany. Construction of the terminal's facilities was financed chiefly by the issuance of $15,500,000 of mortgage bonds, all of which remain outstanding and unpaid. In addition, the railroads concerned subscribed in equal proportions to $500,000 par amount of stock of the Terminal Company, an equity investment representing less than one-thirtieth of the total cost of the facilities constructed.

The Massachusetts Act imposes upon the using railroads the following obligations:[1]

(1) Section 4, which authorized the issuance of the bonds now outstanding, provides that the using railroads "shall be held liable to pay any deficiency in the amount required to pay all of said bonds and the interest thereon" in the event of foreclosure of the mortgage securing them. Provision is made for the enforcement of this obligation by the Supreme Judicial Court of Massachusetts.

(2) Section 9 provides that the railroads "shall use . . . the terminal facilities provided by said terminal company."

(3) Section 10 provides that the using railroads "shall pay to the terminal company for such use . . . such amounts as may be necessary to pay the expenses . . . of the main-

[1]See Appendix A.

tenance and operation of said station . . . including . . . the interest upon its bonds . . .". This section further provides that "the payments required . . . shall be deemed a part of their [the using railroads'] operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process."[1]

Thus the Massachusetts Act created for the benefit of the Terminal bondholders and imposed upon the using railroads two obligations, namely (1) an obligation running directly to the Terminal Company for operating expenses (including bond interest), and (2) an obligation running directly to the Terminal bondholders for any deficiency on foreclosure.

The separate characteristics of these two obligations have been recognized by the courts below and conceded by all parties in interest. The distinction between them should be kept in mind in considering the questions presented by this petition.

2. *The New Haven Reorganization Proceedings.* Bankruptcy proceedings for the New Haven were instituted in October 1935 in the United States District Court for the District of Connecticut. The New Haven was then majority stockholder as well as lessee of Old Colony. The latter was lessee of the Boston and Providence. In 1936 Old Colony went into bankruptcy and the New Haven Trustees were appointed trustees for the Old Colony as well. Operation of

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[1]Under Section 10 of the Act, required payments for operating expenses are to be made by the several railroads on the basis of user, the proportions to be fixed by the Massachusetts Department of Public Utilities (successor to the Massachusetts Board of Railroad Commissioners). By order of that tribunal of July 17, 1931, these proportions were fixed at 70% for the New Haven (then successor by merger to the New England, and lessee of Old Colony and Boston and Providence) and 30% for the New York Central (lessee of Boston and Albany). This order is still in force.

the Old Colony has been continued by the New Haven Trustees for account of the Old Colony. In July 1938 bankruptcy proceedings for the Boston and Providence were instituted in the Massachusetts District Court where they are still pending. The New Haven Trustees have continued, however, to operate the Boston and Providence.

The status of the Boston Terminal Company and its bonds was at first unaffected by these proceedings. No default was made in the obligations due it from New Haven, Old Colony and Boston and Providence until October 1939. At that time, pursuant to an order of the Connecticut District Court,[1] payments for the Terminal Company taxes and bond interest, required by Section 10 of the Massachusetts Act, were discontinued.[2] As a result the Terminal Company was unable to meet its bond interest requirements, and on November 11, 1939 bankruptcy proceedings for it were instituted in the Massachusetts District Court where they are still pending. The only creditors of the Terminal Company, other than current trade creditors, are the holders of the bonds issued under the Massachusetts Act. The only stockholders are the using railroads, the New Haven group owning 80% thereof and the Boston and Albany 20%. No plan of reorganization has been reported.

3. *The New Haven Plan of Reorganization.* The early plans of reorganization considered for New Haven did not attempt to deal with the obligations created by the Massachusetts Act. Not until the Commission's Third Supplemental Report and Order, dated October 6, 1942,[3] was there any public indication that the Commission intended in this proceeding to modify or abrogate those obligations.

But the Third Report of the Commission and those which

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[1]Prior S.C.R., No. 91, Vol. B, p. 6,169.

[2]See *Palmer* v. *Webster & Atlas Bank*, 312 U. S. 156 (1941).

[3]Prior S.C.R., No. 8, Vol. A, p. 9,753.

have followed it have contained provisions which drastically affect the Terminal Company and its bondholders. The effect of Article N. 1(a)[1] of the present plan, contained in the Commission's Sixth Supplemental Report and Order, dated May 14, 1945,[2] and now approved and confirmed by the courts below, was summarized by the Circuit Court of Appeals as follows:

> "Article N. 1(a) . . . provides that the charters of the reorganized company (New Haven) and Old Colony shall be amended so as to release them from the obligation to use the terminal, to reduce retroactively to October 30, 1939, the annual compensation to be paid [on account of bond interest] for such use subsequent to that date to a proportionate percentage of $275,000, and to abrogate the obligation to pay any deficiency on foreclosure of the bond issue."[3]

In short, the plan, as now confirmed, abrogates entirely the two principal obligations imposed by the Massachusetts Act. The obligation of the using railroads to pay any deficiency on foreclosure of the Terminal bonds is completely destroyed. The obligation imposed by Section 10 of the Act is modified so as to reduce the payment for bond interest from a proportion of $536,240 to a proportion of $275,000.[4] Moreover there is no certainty that even this reduced interest will be paid, since the debtor railroads are also relieved from the obligation to continue to *use* the terminal, except at their own election.

4. *The Bondholders and Terminal Trustee Were Not*

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[1]Pertinent provisions of the plan are copied in Appendix B hereto.

[2]Stip. R., No. 3, p. 11,682. For full text of plan, see Stip. R., No. 1, p. 10,831 *et. seq.*

[3]Stip. R., No. 15, p. 12,655 at 12,675-6; CCH Bankruptcy Law Service, Paragraph 55,813 at page 58,529.

[4]The practical effect of this reduction is to cut the interest on the Terminal bonds from 3½% with respect to $13,992,000 of the bonds, and from 4% with respect to $1,163,000 of such bonds, to about 1.77%.

Permitted to Vote on the Plan with Other Creditors. The plan was submitted by the Commission to the vote of creditors of the New Haven in September, 1944, for their acceptance or rejection in accordance with Section 77(e).[1] Neither the Terminal bondholders nor the Terminal Trustee were included in this submission. Thus no Terminal interest was accorded the opportunity to vote upon the plan. Since this is one of the principal errors sought to be corrected by this petition, it is pertinent to review the status of the Terminal claims.

(a) *Status and Treatment of the Bondholders' Claim.* With respect to the bondholders' claim, the Circuit Court of Appeals held: (1) that it ***had not been allowed;*** (2) that it was unliquidated, could not be liquidated without "undue delay", and therefore ***could not be allowed;*** and (3) that since it was not allowed, the holders thereof were not entitled to vote on the plan because the right to vote is conferred only upon holders of "allowed" claims.[2]

The bondholders have urged:

(1) That their claim has in fact been allowed[3];

(2) That their claim remains unliquidated because at all times since the default they have been restrained from foreclosing the Terminal mortgage and establishing their deficiency. A petition for leave to foreclose was filed by the trustee under the mortgage in 1945, but was held under advisement pending developments in the New Haven reorganization. The District Court of Massachusetts handed

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[1]D.R., p. 11,509.

[2]Stip. R., No. 15, p. 12,682; CCH Bankruptcy Law Service, Paragraph 55,813 at page 58,532.

[3]This contention, which will be elaborated in petitioner's Argument, *infra*, is based upon the legal effect of Order No. 45 of the District Court, coupled with subsequent proceedings in this cause. Pertinent portions of Order No. 45 and the Petition therefor are copied as Appendix C hereto.

down its decision on this petition on March 12, 1947, denying leave to foreclose.[1] Thus, there has been no opportunity to establish the precise amount of the deficiency claim. That it will be substantial must be conceded by the New Haven interests, as they sought to prove that the value of the Terminal properties was $9,500,000 — about half the amount of outstanding bonds and accrued interest.[2]

(3) That their claim should, as a matter of law, have been "allowed", for purposes of participating in the reorganization proceedings, in the full principal amount of the debt.

The plan contains no express provision for satisfaction of the claim of the Terminal bondholders, although Article N. 1(a) thereof proposes to destroy it. And the concluding proviso of Article N. 1(b) in the plainest possible language bars *all* creditors of the Terminal Company "from participating as a creditor in these proceedings." This attempt to destroy a claim without making any provision for it in the plan of reorganization was condemned by the Circuit Court of Appeals as "obviously . . . unlawful."[3] However, instead of sending the plan back to the Commission for reconsideration of this "obviously unlawful" provision, the court simply "construed" it out of the plan, and held that the Terminal bondholders were entitled to receive common stock for their deficiency claim along with other unsecured creditors under Article J(17) of the plan.[4]

This extraordinary action of the court in "construing" an admittedly unlawful provision out of a plan is believed to be without precedent in reorganization law, for it usurps

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[1]*In re Boston Terminal Company*, CCH Bankruptcy Law Service, Paragraph 55,870, page 58,642.

[2]Prior S.C.R., Vol. A, I.C.C. Transcript, pp. 4184 *et seq.*

[3]Stip. R., No. 15, pp. 12,683-4; CCH Bankruptcy Law Service, Paragraph 55,813 at page 58,530.

[4]For Article J(17) see Appendix B.

the Commission's exclusive function of formulating the plan.[1]

Its chief significance, however, lies not in its apparent illegality, but in the light which it sheds on the Commission's failure to submit the plan to the Terminal bondholders for acceptance or rejection under Section 77(e). The Commission apparently justified this procedure on the premise that, if the bondholders' claim could be legally destroyed and they could thereby be barred from participating "as a creditor in this proceedings," then it was illogical to submit the plan to them, the very creditors it proposed to exclude from the proceeding. The court below differed with the Commission on its major premise, and held that destruction of the bondholders' claim, as proposed by Section N. 1(a) and (b) was illegal. It then sought some other ground for the denial to the Terminal bondholders of the right to vote, and held that since the claim of the bondholders was "unliquidated", it could not be "allowed" and accordingly was not "votable." Thus the court justified on one ground action justified by the Commission on an entirely different ground. It is believed that neither ground is sound.

(b) *Status and Treatment of the Terminal Trustee's Claim.* The plan in terms purports to make provision for the claim of the Terminal Company resulting from the abrogation of the obligation to use the Terminal and pay the operating expenses thereof, including bond interest. Under the terms of Article N. 1(b)[2] a so-called "offer" is to be made to the Trustee of the Terminal Company "to elect [1] whether he will exclude the using bankrupt railroads from further occupation and use . . . of the . . . Terminal . . . and file a proof of claim for damages . . ." *or* [2] whether he "will accept the terms proposed in the plan for the continued

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[1]*Ecker* v. *Western Pacific R.*, 318 U.S. 448, 472, 474 (1943).

[2]Appendix B.

. . . use of such property . . . and thereby waive all claim of damages arising from the rejection and all claims for compensation for use of its property other than such compensation as is provided by the plan . . ."

The "terms" referred to above are those in Article N. 1(a) of the plan which (1) eliminate the obligation to continue to use the Terminal except at the pleasure of the debtor railroads, (2) eliminate the deficiency claim of the bondholders, and (3) reduce the interest payments (so long as the roads use the Terminal) to a proportion of $275,000. The "offer", then, is to accept these terms or to claim compensation for use of the property during the bankruptcy proceedings (clearly an administrative claim) and damages for the anticipatory breach of the continuing obligations imposed on the debtor railroads by the Massachusetts Act.

Article N. 1(b) further provides that the "election" thus afforded the Terminal Trustee is "to be exercised upon submission to him by this Commission of the plan for acceptance or rejection under Section 77(e) of the Bankruptcy Act." Despite this express language, the plan was not submitted to the Terminal Trustee when it was submitted to the vote of the other creditors in 1944, and indeed has not yet been submitted to him. Thus, he has never had the opportunity to accept or reject the so-called "offer", or to prove his claim for damages.

The District Court "construed" the plan to mean that the "offer" should not be submitted to the Terminal Trustee until *after* confirmation of the plan[1]—a construction entirely incompatible with the plain language of Article N. 1(b) that the "offer" be submitted "for acceptance or rejection under Section 77(e)". As a result of this delay in the submission of the "offer", the Terminal Trustee has been denied the right which the Section 77 prescribes for

[1]Prior S.C.R., No. 16, Vol. A, pp. 11,034-5; 54 Fed. Supp. 631 at page 638.

all creditors of participating in the reorganization proceedings. He has thus been denied the right to prove his claim for damages, to have it allowed, to have his claim for preferential status passed upon, to vote upon the plan, and to participate otherwise as a creditor.

The right to vote on the plan would have been particularly valuable to the Terminal bondholders. If as a result of their vote or the vote of the Terminal Trustee, the plan had been rejected as it affected the Terminal interests, they would have then had the right under Section 77 to a "hearing" at which "all relevant facts" as to the treatment accorded them would have been considered. Confirmation could not then have been decreed until, after such a hearing, the court found that the plan made "adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection [was] not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts", and that the plan conformed to other requirements of Section 77.[1]

The right to a hearing would have had a special significance for the bondholders. As the record shows, it would be their first opportunity since they intervened in this proceeding in 1942 to introduce evidence with respect to, or be heard upon the merits of, the treatment imposed upon them by the plan.

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[1]As pointed out by Mr. Justice Reed in the Denver case: "If there is a rejection, there is a re-examination of the plan to assure that those who dissent have had fair and equitable treatment." *R. F. C.* v. *D. & R. G. W. R.*, 328 U. S. 495 (1946).

SUMMARY OF REASONS FOR REVIEW BY THIS COURT

The court below has decided important questions of federal law which have not been, but should be, settled by this Court. The first of these is whether creditors whose claim is dealt with and sought to be discharged in a plan of reorganization under Section 77 of the Bankruptcy Act may nevertheless be denied the right to have their claim allowed, with the consequent denial of the right to participate in shaping the reorganization and vote upon the plan. Although this precise question has not previously been before this Court, its decision has been foreshadowed by *City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433, 438 (1937) and *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 453 (1937). Indeed, the reasoning of these two cases so nearly applies to the decision below that it may well be deemed to be in conflict with decisions of this Court.

The reasons assigned by the court below for refusing to allow the bondholders' claim and for denying their right to vote are of general application, and unless reversed by this Court will constitute precedents contrary to established procedure in reorganizations as well as to decisions of other Circuit Courts. The invoking of Section 57(d) of the Act as the ground for disallowing a claim in a proceeding under Section 77 is unprecedented and plainly unlawful. The failure to allow the bondholders' claim in its maximum possible amount was contrary to the procedure approved in *In re Akron, Canton & Youngstown Ry. Co.*, 117 Fed. 2d 961 (C.C.A. 6, 1941). The insistence that the bondholders must liquidate their claim by recourse to the security therefor before such claim is allowable is contrary to the decision in *In re United Cigar Stores Co.*, 73 Fed. 2d 296 (C.C.A. 2, 1934), cert. den. 293 U. S. 709 (1935).

A further important question which should be settled by this Court arises from the treatment accorded the Terminal Trustee. The prevention of the Trustee from participating in the reorganization proceedings by an "offer" of new terms, the making of which was postponed until *after* confirmation of the plan, is contrary to the purpose and plain intent of the Act. It is also contrary to the decision in *Consolidated Power Co.* v. *United Railways Co.*, 85 Fed. 2d 799 (C.C.A. 4, 1936), cert. den. 300 U. S. 663 (1937). If this "delayed offer" technique is sanctioned a means will be available to circumvent the orderly procedure prescribed by the Act of submitting the plan to creditors in advance of confirmation.

ARGUMENT

I. Section 57(d) of the Bankruptcy Act, dealing with the disallowance of certain unliquidated claims in ordinary bankruptcy, may not lawfully be applied to a reorganization proceeding under Section 77 with the result that a valid but unliquidated contingent claim is disallowed and the holders thereof denied the right to vote on the plan of reorganization which purports to discharge the claim.

The Commission's refusal to submit the plan to the Terminal bondholders was justified by the court below on the ground that the bondholders' claim was neither allowed nor allowable and the holders thereof were therefore outside the ambit of subsection (e) of Section 77 which extends the voting right only to holders of "allowed" claims.

In holding that the bondholders' claim was not allowable, the court coupled a finding (discussed in II *infra*) that liquidation of the claim would result in "undue delay" with the provisions of Sections 57(d) and 77(l) of the Bankruptcy Act.

Section 57(d) provides in part:

> ". . . an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be *allowed* if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act." (Italics added)

And Section 77(l) provides that in proceedings under Section 77 and "consistent with the provisions thereof" the rights and liabilities of creditors shall be the same as if a voluntary petition for adjudication had been filed and a decree thereon entered on the day when the debtor's petition was filed.

In other words, the validity of the holding of the court below depends upon whether the above provision of Section 57(d) is or is not consistent with the statutory scheme of Section 77.

Section 57(d) is part of the general bankruptcy law, applicable to so-called "ordinary bankruptcy." Section 77 is a special form of procedure, designed for the relief of a particular class of debtors, namely railroads. Any consideration of the compatibility of Section 57(d) with the reorganization provisions of Section 77 must therefore be based upon an analysis of the procedure in both ordinary and railroad bankruptcy.

Section 77 is silent as to the allowance of claims. Subsection (c)(7) thereof imposes upon the bankruptcy court the duty of "promptly" determining the "time within which" and the "manner in which" claims may be "filed or evidenced and allowed". And Section 77(f) provides that confirmation of the plan of reorganization shall operate to discharge the

debtor from *all* claims of whatsoever character, other than those expressly saved in the plan.

An examination of Section 57(d) in its context shows that it is, by express statutory cross-reference, one of a trio of provisions dealing with the proof, allowance and discharge of creditors' claims. As we have seen, Section 57(d) provides for the disallowance of certain contingent or unliquidated claims. Section 63(d) of the Act is as follows:

> "Where any contingent or unliquidated claim has been proved, but, as provided in subdivision (d) of section 57 of this Act, has not been allowed, *such claim shall not be deemed provable under this Act.*" (Italics added)

And Section 17 provides in part:

> "A discharge in bankruptcy shall release a bankrupt from all his *provable* debts. . ." (Italics added)

In other words, if, under Section 57(d) a claim is not allowable, then, under Section 63(d) it is deemed not provable, and hence, under Section 17, not dischargeable.

Is Section 57(d) consistent with Section 77? Petitioners submit that the two sections are clearly inconsistent. This may be illustrated by a consideration of the results which would be reached in ordinary and railroad bankruptcy, respectively, by applying the proviso of Section 57(d) to a creditor's claim in each proceeding.

In ordinary bankruptcy, Section 57(d), as restricted by Section 63(d), would result in denial of a discharge under Section 17; that is, the creditor's claim would be preserved. In railroad bankruptcy, if Section 57(d) were applied, the creditor's claim would likewise be disallowed, and, consistently, should be neither provable nor dischargeable. But under Section 77(f) it *is* dischargeable. And in the case of the Terminal bondholders' claim, the plan confirmed by the courts below expressly provides for its discharge.

This distinction between the patterns of ordinary and reorganization proceedings has been recognized by this Court. In *City Bank Co.* v. *Irving Trust Co.*, 299 U.S. 433, 439(1937),[1] in speaking of corporate reorganizations under Section 77B (now Chapter X), the Court said:

> "A salient element in such a reorganization is the discharge of all demands of whatsoever sort, executory and contingent, presently due or to mature in the future. . . . *Obviously if such obligations are to be discharged they must be made provable, for they cannot be destroyed.*" (Italics added)

Thus it is clear that Section 57(d) is inconsistent with the statutory scheme of Section 77, and hence, under Section 77(l), inapplicable to reorganization proceedings.

The Circuit Court's decision to the contrary raises a serious question of federal law, of general importance in the administration of both Section 77 and Chapter X, which has not been, but should be, settled by this Court.

II. Under Section 77, the holders of an unliquidated contingent claim, the validity of which is admitted, and which is dealt with and sought to be discharged by a plan of reorganization, may not lawfully be denied the right to prove the claim and have it allowed, and the consequent right to vote on the plan and participate with other creditors in shaping the reorganization.

1. As a Matter of Law, the Bondholders' Claim Should Have Been Allowed.

(a) *Preliminary Statement.* The bondholders contended before the court below that their claim had in effect been allowed in its full amount. This contention is based upon the

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[1]And compare *Maynard* v. *Elliott*, 283 U.S. 273, 278 (1931).

legal effect of Order No. 45 of the District Court,[1] coupled with inclusion in the plan of provisions affecting the Terminal interests.

Order No. 45, by express terms, made formal proof of the bondholders' claim unnecessary. Thus their claim was clearly *proved*. And it is settled law that no formal order of *allowance* is necessary where, as here, the existence and validity of the claim is admitted by the order of distribution (plan of reorganization). *Hammer* v. *Tuffy*, 145 Fed. 2d 447, 450 (C.C.A. 2, 1944); *In Re Jayrose Millinery Co.*, 93 Fed. 2d 471, 475 (C.C.A. 2, 1937); and *In re Two Rivers Woodenware Co.*, 199 Fed. 877 (C.C.A. 7, 1912).

(b) *Under Section 77 a Claim May Not Be Disallowed and at the Same Time Discharged.* The discussion in I above has emphasized the error of applying Section 57(d) as a means of disallowing a claim in a Section 77 proceeding. The question remains whether, *under Section 77*, a claim may be disallowed and at the same time discharged.

The opinion of the Circuit Court of Appeals is difficult to follow on this point because of that court's heavy reliance on Section 57(d). Although holding that the bondholders' claim was not allowable and that, as a corollary, they were not entitled to the rights provided for creditors under Section 77, the court conceded that the bondholders were "creditors whose rights the plan proposes to modify" and for whom "provision must be made" in the plan. It indeed "construed" out of the plan the provision of Article N. 1(b)[2] which barred the claim of the bondholders without any compensation.

Thus the court in effect said, on the one hand: The Terminal bondholders are not creditors entitled to the rights, including the right to vote, accorded to other creditors under

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[1]Appendix C; Stip. R., No. 20, p. 1.
[2]Appendix B. And see discussion under "Statement" *supra*.

Section 77. And on the other: The Terminal bondholders are creditors whose claim can be discharged by the plan which they cannot vote upon.

The court justified this inconsistency as follows:[1]

> "We think that the correct construction of the statute is to say that a creditor whose claim cannot be liquidated or otherwise 'estimated' without unreasonably delaying a given step in the administration of the debtor's estate, may not share in that step . . ."

In using the above language, the court was, of course, relying on Section 57(d). If petitioners are correct in their view that that section is inapplicable, the court's holding can be justified, if at all, only by provisions of Section 77 itself.

It is submitted that no provision of Section 77 contemplates the "twilight zone" prescribed by the court below in which a claim is sufficiently liquidated to be dischargeable but not sufficiently liquidated to assure to the creditor the rights of a holder of a proved and allowed claim.

The legislative intention to allow unliquidated and contingent claims in a reorganization proceeding regardless of the difficulty of liquidating or estimating them is supported by Section 77 itself.

Thus (1) the term "claims" is defined, more comprehensively than in ordinary bankruptcy, to include debts "whether liquidated or unliquidated" (Section 77(b)); (2) the term "creditors" is likewise broadly defined to include *"for all purposes of this section"* "all holders of claims of whatever character . . . *whether or not such claims would otherwise constitute provable claims under this Act"* (Section 77(b)); and (3) there is significantly omitted any provision analogous to Section 57(d) of the general bankruptcy law.

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[1]Stip. R., No. 15, p. 12,684; CCH Bankruptcy Law Service, Paragraph 55,813 at p. 58,532.

Decisions of this Court likewise support the view that, *in reorganization proceedings*, the holders of unliquidated and contingent claims are to be accorded the full status of creditors. See *City Bank Co.* v. *Irving Trust Co.*, 299 U.S. 433, 439(1937); *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 453(1937); *Connecticut Ry. Co.* v. *Palmer*, 305 U.S. 493, 498(1939). And compare *Manhattan Properties Inc.* v. *Irving Trust Co.*, 291 U.S. 320, 331(1934); *Maynard* v. *Elliott*, 283 U.S. 273, 278(1931); and *Central Trust Co.* v. *Chicago Auditorium*, 240 U.S. 581, 589 *et seq.* (1916).

Were the rule otherwise, then, as to the holders of such claims, the requirement of Section 77(e) that the judge must find the plan to be "fair and equitable" would be meaningless. It is submitted that the court below was in error in holding that the bondholders' claim could be discharged without being allowed and accorded the rights inherent in an allowed claim.

2. The Claim Should Have Been Allowed in Its Maximum Possible Amount and Without Deducting the Value of Outside Security.

(a) *Preliminary Statement.* The court below based its disallowance of the bondholders' claim on its finding that "undue delay" would be caused by proceedings for liquidation of the claim. If the law set forth above is correct, this finding is of course immaterial. To save the point, however, it should be stated that that finding is original with the court below, that no such finding was made either by the Commission or the District Court, and that the facts do not support such a finding.

It is true, as the court below stated, that the Supreme Judicial Court of Massachusetts is given jurisdiction under the Massachusetts Act to liquidate the bondholders' claim and apportion it among the using railroads, but the exercise

of that jurisdiction is not tantamount to "undue delay". It should be remembered that subsection (c)(7) of Section 77 imposes upon the *bankruptcy judge* the duty of providing for the allowance of claims and it is not tenable to assume that had the judge, in the discharge of that duty, requested the cooperation of the Massachusetts Court, it would not have been forthcoming during the more than eleven years of this proceeding. Such proceedings, even if had now, would consume only a short period.

(b) *There Is Authority for the Allowance of an Unliquidated Contingent Claim in Section 77 Proceedings.* The above discussion reduces the problem before the court below to one of method; that is, how to allow the bondholders' claim and at the same time assure full protection to other claimants against the debtor and its properties.

The problem of the method of allowance of an unliquidated contingent claim, while novel in railroad reorganization law, is not unique. In *In re Akron, Canton and Youngstown Ry. Co.*, 117 Fed. 2d 961 (C.C.A. 6, 1941), the court faced and solved the precise problem which confronted the court below. There was there involved an unliquidated contingent claim against the debtor, based upon a contract of indemnity.[1] The court allowed the claim in its maximum

[1]The facts of the Akron case bear close analysis, as is evidenced by the apparent misunderstanding thereof by the court below. They are as follows:

> The principal debtor was the Akron, Canton & Youngstown Ry. Co. (hereinafter called "Akron"), and its subsidiary, Northern Ohio Ry. Co. (hereinafter called "Northern"), was an intervening debtor. Northern had issued its first mortgage bonds which, with unpaid interest, aggregated $3,000,000. These bonds had been guaranteed by the Lake Erie & Western Railway Company (hereinafter called "Lake Erie"); and Akron, in turn, had agreed to hold Lake Erie harmless on its guaranty. The plan of reorganization encompassed both Akron and Northern which were to be consolidated. It provided for the issuance of new bonds and stock "whose face value equalled the face of the old bonds [of Northern] and unpaid interest which were the

possible amount, i.e., the full amount of the bonds guaranteed by the creditor and as to which guaranty it was indemnified by the debtor railroad. The plan set aside stock to meet this claim, if and when it should ever materialize and become liquidated, and meanwhile the holder thereof was accorded the full status of a creditor. The right to vote was not involved, since the appeal was from approval of the plan and prior to the submission thereof to creditors. But the right to vote necessarily followed from the holding that the indemnity claimant was a general creditor of the debtor to the extent of the maximum possible amount of its claim.[1]

There is no reason why this precedent should not have been followed in the instant case. The maximum claim of the bondholders is obviously the full principal amount of their bonds. The claim, like that in the *Akron* case, should have been accepted on this basis for purposes of participating in the reorganization and voting on the plan of reorganization.

(c) *The Bondholders' Claim Should Have Been Allowed in Its Full Amount.* The court below indicated that if the bondholders' claim was allowable at all, it was allowable only after deducting the value of the properties mortgaged to secure the Terminal bonds.

It is settled law that where a creditor holds security from a principal obligor (Terminal Company) and also holds the guaranty, indemnity or other secondary liability of a bankrupt (New Haven), the creditor is not required to resort first to his security before proving against the bankrupt the full amount of his claim. This principle has been too recently enunciated by this Court to require reargument. *R.F.C.* v. *D. & R.G.W.R.*, 328 U.S. 495 (1946).

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subject of the guaranty". The plan further provided for the elimination of Akron's agreement to indemnify Lake Erie as the guarantor of Northern's bonds.

[1]See also the discussion in 5 Collier on Bankruptcy, 14th Ed., Section 77.20, which suggests the solution adopted by the Sixth Circuit in the *Akron* case.

A word should be said, however, concerning the decision of the court below. The case of *In re United Cigar Stores Co.*, 73 Fed. 2d 296 (C.C.A. 2, 1934), cert. den. 293 U.S. 708, is a close parallel to the instant case. The court below refused to follow its own precedent in that case on the ground that there was there involved a "guaranty" claim and that the bondholders' claim was based on an indemnity. It might be noted that Section 77 makes no such distinction, nor is it justified on principle. Finally, the *Akron* case, which also allowed proof for the full amount, ***involved an indemnity and not a guaranty.***

The safeguard adopted by the court in the *Akron* case, to prevent receipt by the creditor from any source in excess of the face amount of the claim, could readily have been incorporated in the instant plan by reserving an amount sufficient to meet the bondholders' claim if and when established in terms of dollars and cents. Actual payment of any part of the claim could be postponed until final liquidation thereof.

It is submitted that the court below erred in failing to allow the bondholders' claim (a) in its maximum potential amount, and (b) before deducting the value of "outside collateral."

III. A creditor, whose position is analogous to that of a claimant under an executory contract or unexpired lease which has been rejected by a plan, may not lawfully be denied the right to vote on the plan by the device of inclusion therein of an offer of new terms, the making of which is postponed until after confirmation of the plan.

The second claim of the Terminal interests is that of the Terminal Trustee[1] for damages resulting from breach of

[1]The Terminal Trustee was not a party before the court below and is not a party to this petition, but as the Circuit Court of Appeals

the obligations imposed by Section 10 of the Massachusetts Act.

The plan[1] provides as to this claim for the making of an "offer" to the Terminal Trustee to "elect" whether to accept a reduced rental for the terminal facilities or to reject the same, exclude the debtor railroads from use of the terminal, and file a proof of claim for damages. Article N. (1) b of the plan expressly states that this "election" is to be exercised by the Trustee "upon submission to him . . . of the *plan* for acceptance or rejection *under section 77(e)* of the Bankruptcy Act."

Despite this express language, the courts below held that what the Commission intended by its use was not a submission of the *plan* under Section 77(e), but a submission of the *offer* contained therein, *after* submission of the plan to all other creditors under Section 77(e).

This procedure was in fact followed and the Terminal Trustee has not yet been afforded the opportunity to exercise his "election". The adoption of such a procedure raises a question of paramount importance to all claimants under executory contracts and unexpired leases[2] which are rejected by plans of reorganization. That question is whether such claimants may, despite the discharge of their claims, be denied the right to participate and vote as a creditor in the reorganization proceedings by the expedient of accomplishing rejection of their contracts or leases through an offer

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said, "consideration of its right seems proper, since the amount of the bondholders' deficiency claim will be materially affected by the enforcement of the right of the Terminal Company to collect part of its operating expenses from New Haven and Old Colony." Stip. R., No. 15, p. 12,675; CCH Bankruptcy Law Service, Paragraph 55,813 at page 58,529.

[1]Appendix B.

[2]The analogy is that of the court below. See 147 Fed. 2d 40, at page 52.

of new terms, the making of which is postponed until after confirmation of the plan.

(a) *The Act Requires That Such Claimants Shall Be Creditors for All Purposes.* Section 77 contains provisions dealing expressly with executory contracts and unexpired leases.[1] They were included to meet the inadequacy of existing law in ordinary bankruptcy and equity receiverships where the doctrine of "anticipatory breach" was not recognized and claimants were not permitted to prove claims for future rent or damages for anticipatory breach.[2] The purpose and effect of the provisions of Section 77 and of Chapter X with respect to leases and executory contracts have been construed by this Court in a manner which should have been conclusive upon the court below. *City Bank Co.* v. *Irving Trust Co., supra,* and *Kuehner* v. *Irving Trust Co., supra.* In the latter case this Court said:

> "if the landlord's claims [are] to be discharged in the reorganization they must be admitted to participation on an equitable basis with other claims in shaping the reorganization and in distribution of that which is to go to creditors pursuant to any plan adopted."[3]

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[1]Section 77(b) provides in part as follows:

"In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, *any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor* of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings." (Italics added)

[2]See Douglas and Frank, Landlords' Claims in Reorganization (1933), 42 Yale Law Journal 1003; Clark, Foley and Shaw, Adoption and Rejection of Contracts and Leases by Receivers (1933), 46 Harvard Law Review 1111; Gerdes on Corporate Reorganization, Vol. 2, Chapter 13, Leases and Executory Contracts, Section 682 et seq; and Finletter, Principles of Corporate Reorganization (1937), page 270 et seq.

[3]299 U. S. 445 at page 453.

The Terminal Trustee was denied altogether the right "to participate . . . with other claims in shaping the reorganization." He was denied this right in a manner which, if lawful, will afford a precedent by which the rights of all claimants under executory contracts and unexpired leases may be similarly defeated.

(b) *A Creditor May Not Lawfully Be Compelled to Consider an Offer of New Terms in Lieu of the Rights Prescribed by Section 77.* If the Terminal Trustee accepts the offer contained in the plan, he will of course have no right to vote thereon. If he rejects the offer, he will still have no right to vote on the plan because it has already been confirmed. Thus, by the expedient of *postponing* the offer until after confirmation of the plan, he has been denied all the rights provided by law for his protection.

Of course new terms may be offered lessors or other creditors, but the alternative to acceptance of the new terms must necessarily be the creditor's rights as prescribed by the Act. This seems too elementary to require statement. Yet it is manifest that the offer here involved proposes new terms and makes the penalty for not accepting them deprivation of the right to participate in the plan and to vote thereon.

If the procedure of a delayed offer is established as proper, a means will have been provided for circumventing the statutory rights of virtually all creditors affected by a reorganization plan. Under the guise of an offer of new terms, deliberately delayed until after confirmation of the plan, the entire statutory scheme, of an orderly procedure involving submission of the plan to creditors *in advance* of confirmation, will be defeated.

(c) *Conflict Between Circuits.* The decision below in sustaining the "delayed offer procedure" appears to be in

direct conflict with the decision of the Fourth Circuit Court of Appeals in *Consolidated Power Company* v. *United Railways Co.*, 85 Fed. 2d 799 (1936), cert. den. 300 U. S. 663 (1937). In that case a long term executory contract was neither adopted nor rejected prior to confirmation of a plan of reorganization, with the result that the Power Company, a party to the contract, had not been permitted to prove its claim or to participate in the reorganization. The plan reserved the disposition of such contract until after confirmation. This procedure was condemned by the court in the language set forth below.[1]

The delayed offer device is identical in principle and result with the procedure in the *Consolidated Power Company* case. And through its use the Terminal Trustee has been denied the right to "participate in the acceptance or confirmation of the plan," a right expressly recognized by the Fourth Circuit Court of Appeals.[2]

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[1]"Despite this practical consideration of convenience, we are of opinion that the reservation in the pending case was inconsistent with the plan of reorganization and with the terms of the statute concerning the claims of creditors. It was not possible for the Power Company to proceed as a creditor entitled to damages for breach of the contract prior to the ratification of the plan of reorganization, because the contract had not then been rejected, either by the plan or by the District Court. *Hence the Power Company could not file a claim as creditor,* with reference to the contract, or *participate in that capacity in the acceptance or confirmation of the plan* . . . These observations would apply in the case of any executory contract; and hence we conclude that if an executory contract is to be rejected on behalf of the debtor so as to give the other contracting party the status of an unsecured creditor, the right of rejection must be exercised in the plan of reorganization, or upon the direction of the judge, *before the plan is confirmed.* This must be so . . . . . because an injured contractor must be given an opportunity to share as a creditor in the formation of the plan and the distribution of securities . . ." (85 Fed. 2d 799 at pages 802-3; italics added)

[2]It is to be noted that the *Consolidated Power Company* case is, in its reasoning, fully in accord with the decisions of this Court in the *City Bank Company* and *Kuehner* cases, *supra.*

(d) *The Offer Procedure Has Adversely Affected the Bondholders' Position.* As the court below stated, the amount of the bondholders' deficiency claim will be materially affected by the amount recovered by the Terminal Company on its claim. Thus, the delaying of the making of the offer to the Terminal Trustee until after confirmation of the plan has, as a practical matter, prevented any of the Terminal interests from establishing their positions in this reorganization.

The Terminal Company itself is in bankruptcy as a result of the default by the New Haven on its obligations. It has been impossible to present or consider a plan of reorganization for the Terminal Company until this New Haven offer was presented to the Terminal Trustee. Obviously, widely divergent consequences will flow from the Trustee's election to accept or reject this offer. In view of its harsh terms, presumably the offer will be rejected, and certainly this bondholders' committee will so recommend.

There is no reason for the withholding of that offer. It could and should have been submitted at the same time as the submission of the New Haven plan to other creditors under Section 77(e). Indeed, as is evidenced from the language of Article N(1)(b) of the plan, this was the original intent of the Commission.

IV. A bankruptcy court in a Section 77 proceeding does not have power to modify or abrogate by a plan of reorganization provisions of a state statute, passed in the exercise of the police power, imposing continuing obligations upon the debtor railroads.

The Terminal bondholders have contended throughout this proceedings that the bankruptcy court did not have the power or jurisdiction to abrogate or modify the continuing obligations imposed by the Commonwealth of Massachu-

setts, in the exercise of its police power, upon railroads using the Boston Terminal. This contention was denied by the Circuit Court of Appeals in 1945, and this Court refused certiorari. (*In re New York, New Haven & Hartford R.*, 147 Fed. 2d 40 (C.C.A. 2, 1945), cert. den. 325 U. S. 884 (1945)). If certiorari is granted pursuant to this petition, the bondholders reserve the right to argue this question as to the power of the bankruptcy court, as well as questions of procedure and due process raised in the prior petition for certiorari.

CONCLUSION

The decision below if permitted to stand will create precedents with disturbing implications in the entire field of corporate reorganization. It is respectfully submitted that the writ should be granted.

Dated: May 9, 1947.

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APPENDIX A

Excerpts from Massachusetts Acts and Resolves, 1896, Chapter 516

"Section 4. Said terminal company, to provide means to carry out the purposes of this act, may from time to time issue coupon or registered bonds, in sums of not less than one hundred dollars each, payable at periods not exceeding one hundred years from the date thereof, bearing interest not exceeding four per cent. per annum, payable annually, semi-annually, or quarterly, to such an amount as may be necessary and as may be approved by the board of railroad commissioners. No bonds shall be issued unless approved in writing by at least three of the trustees of the corporation. Said corporation may mortgage or pledge as security for the payment of such bonds or of any bonds given in renewal thereof, a part or all of its real estate and other property. In case any mortgage made to secure bonds issued by the terminal company under the provisions of this act shall be foreclosed, and there shall not be thereby realized a sum sufficient to pay all the then outstanding bonds secured by said mortgage, said railroad companies shall be held liable to pay any deficiency in the amount required to pay all of said bonds and the interest thereon in such proportions as may be just and equitable, having regard to the use which they or their lessees may have respectively had of the mortgaged property; and the supreme judicial court shall have jurisdiction in equity to determine such proportions and to compel such payments to be made, so that the full payment of the principal and interest of bonds issued under the provisions of this act by the terminal company shall not in any event fail. Any such mortgage shall be made to a trustee or trustees approved in writing by the board of savings banks commissioners, and savings banks and institutions for savings may invest in such bonds when so secured.

* * * * * *

"Section 9. All said railroad companies upon the completion of said station shall use the same, and the terminal

facilities provided by said terminal company on the land herein-above authorized to be taken, for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce this provision; but said terminal company may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station hereinafter provided for as may be reasonably necessary for their respective use.

"Section 10. Said railroad companies hereby required to use said union station shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock. Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement of all of the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies, and the payments required to be made by them respectively to

said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process."

APPENDIX B

Excerpts from Plan of Reorganization

"J(17) The common stock available for distribution to the holders of unsecured obligations and claims shall be distributed among them upon the basis of the relationship between the amount of each claim as finally allowed by the court to the total amount of all such claims. The public holders of 24,150 preferred shares of the Boston Railroad Holding Company shall, to the extent finally allowed by the court for any breach of the contract of guaranty, both for par value and dividends, be included among the holders of unsecured obligations and claims.

"The court shall determine at the time of consummation the amount of common stock necessary to be reserved for the satisfaction of claims not then liquidated and shall reserve the amount so determined for that purpose (any excess so reserved to be sold by the reorganization committee and the proceeds distributed in lieu of stock or scrip to the holders of the new common stock.)

* * *

"N. The reorganized company shall acquire as a part of its reorganization all of the properties, franchises, and assets of the Old Colony except those of the Old Colony's Boston group (those covered in Finance Docket No. 12614) upon the terms and conditions as follows:

"1(a) The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old Colony (including any charter, franchises, and statutory obligations acquired by the reorganized company in connection with the acquisition of the properties, assets, and franchises of any other railroad, and as operator of the Boston group) shall be amended or superseded so that (1) the reorganized company and Old Colony will be relieved of any obligation to continue to use the property of the Boston Terminal Company, and of any obligation to make any payments for such use if and when such use shall be dis-

continued; (2) the obligation of the reorganized company and Old Colony and their trustees to make payments on account of interest and principal (at maturity or otherwise, including any deficiency on foreclosure or any other claim with respect thereto) of the debt of the Boston Terminal Company represented by its presently outstanding bonds (or any extensions, renewals or refunding thereof) after the date on which the trustees have made the last payments on account of interest on said bonds, shall, so long as the reorganized company (for itself or as operator of the Boston group) shall use the property of the Boston Terminal Company, be satisfied by payment by the reorganized company of an amount per annum (and at that rate for any period of less than a year) obtained by applying to $275,000 the percentage of the total use of such property from time to time by the principal debtor (including in such percentage prior to the consummation of the plan use by its trustees for itself and as operators of Old Colony and thereafter use by itself and as operator of the Boston group); and (3) the obligation to pay operating expenses shall be limited to the amount of such expenses after deducting all revenues from rentals and concessions; provided, however, that, if the number of passengers using the South Station of the Boston Terminal Company shall substantially increase in the future, this Commission will consider an application by any bondholder of the Terminal Company to make an equitable revision of the amount payable by the reorganized company.

"(b) The trustee in bankruptcy of the Boston Terminal Company or any receiver in equity which may hereafter be appointed by any court of competent jurisdiction to manage the property and affairs of such corporation shall have the right to elect whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Boston Terminal Company and file a proof of claim for damages in these proceedings, or will accept the terms proposed in the plan for the continued occupation and use of such property by such railroads and thereby waive all claim of damages arising from the rejection and all claims

for compensation for the use of its property other than such compensation as is provided by the plan, such election to be exercised upon the submission to him by this Commission of the plan for acceptance or rejection under section 77(e) of the Bankruptcy Act and within such time thereafter as this Commission in its order of submission shall fix; provided, however, that if such trustee or any successor-receiver shall not exercise his election by rejecting the plan within the time thus limited, and shall not file a claim for damages herein within the 2 weeks next succeeding, then such trustee, his successor-receiver, the Boston Terminal Company and its creditors and stockholders shall, each and every one of them, be barred from participating as a creditor or creditors in these proceedings, or from prosecuting any claim for damages against the estate of the using bankrupt railroads."

APPENDIX C

Excerpts from Petition for Order No. 45 of the District Court and Order No. 45

1. *Petition for Order No. 45.*

"PETITION OF DEBTOR RESPECTING THE FILING OF CLAIMS ON CERTAIN CLAIMS AND SECURITIES

"Now comes the Debtor and respectfully represents: . .

"41. That there are outstanding in the hands of the public $13,992,000 principal amount of The Boston Terminal Company, Three and One-Half Per Cent First Mortgage Bonds, maturing on February 1, 1947, and $1,163,000 principal amount of The Boston Terminal Company, Four Per Cent First Mortgage Bonds, maturing on July 1, 1950, the entire outstanding amounts issued. The Debtor, together with other railroad companies, is liable to pay any deficiency following foreclosure of the mortgage securing said Bonds, all as set forth in Chapter 516 of the Acts of the Commonwealth of Massachusetts of 1896, as amended.

. . . . . .

"46. That many of the foregoing securities are widely held, that numerous inquiries are being made to the Debtor concerning the filing of proofs of claim and of evidence of interest relating thereto, and that, unless an order be entered amplifying Order No. 32 herein in respect of the foregoing claims and securities, many persons will be unnecessarily burdened in the premises and the expense of reorganization substantially increased.

"WHEREFORE, the Debtor prays that an appropriate order be entered accordingly.

Dated: March 13, 1936."

2. *Order No. 45*

"ORDER RESPECTING THE FILING OF CLAIM ON CERTAIN CLAIMS AND SECURITIES

"Upon due consideration of the verified petition of the Debtor with respect to the filing of claim and of evidence of interest relating to the claims and securities referred to in such petition, and upon the oral motion of the Debtor, it is ORDERED:

. . . . . .

"3. That unless and until a time is subsequently fixed by an order of this Court for the filing of claims thereon and notice thereof is given, no further claim need be filed relating to any of the following securities, but paragraphs 39 to 43, both inclusive, of the verified petition of the Debtor for this order shall constitute a sufficient filing or evidencing of said claims or interests:

. . . . . .

"The Boston Terminal Company, Three and One-Half Per Cent First Mortgage Bonds, maturing on February 1, 1947;

"The Boston Terminal Company, Four Per Cent First Mortgage Bonds, maturing on July 1, 1950;

. . . . . .

"6. That any party to these proceedings or anyone else having a substantial interest, upon leave of Court for cause shown may, within sixty days of the entry of this order or within sixty days of the filing of any claim hereafter filed pursuant hereto, protest the claim as filed or evidenced for reasons to be fully stated in such protest. In the absence of protest the aggregate amount of the bonds or other securities outstanding shall be considered as prima facie correct for the purposes of these proceedings.

"7. That nothing contained herein shall constitute a determination of the nature or extent of the liability of the Debtor upon any claim now or hereafter filed hereunder or

upon any guaranty, endorsement, or other contingent obligation nor shall constitute the allowance by the Court of any claim against the Debtor, nor shall in any way prejudice the right of the Debtor or its trustees or any other party in interest for cause shown to object to any claim now or hereafter filed hereunder, nor shall constitute the trustee or trustees under any mortgage the representative or representatives of security holders for the purpose of accepting or rejecting any plan of reorganization. The Court reserves jurisdiction, if and when necessary in these proceedings, to require formal proof by any creditor or mortgage trustee and reserves the right to abrogate or modify this order in any other manner that the Court may hereafter deem proper.

. . . . .

"Dated: March 13, 1936."

OPPOSITION

BRIEF

In the Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 1368, 1369

PROTECTIVE COMMITTEE FOR BONDS OF OLD COLONY RAILROAD COMPANY, PETITIONERS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, ET AL.

INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS, PETITIONERS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND COURT

MEMORANDUM FOR THE RECONSTRUCTION FINANCE CORPORATION

The Reconstruction Finance Corporation (hereinafter referred to as RFC), as a holder of collaterally secured notes of The New York, New Haven and Hartford Railroad Company, is

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a respondent in this reorganization proceeding, and supported the reorganization plan in the lower courts.

In view, however, of the circumstances outlined below, the RFC's financial interest in the proceeding is no longer of sufficient substance to warrant it in taking any position with respect to the petitions for certiorari.

The Interstate Commerce Commission's original report approving a plan of reorganization for *The New York, New Haven and Hartford Railroad Company,* 239 I. C. C. 337, 459, (1940), shows RFC as the holder of $10,730,415 principal amount of the Railroad Company's notes, some of which evidenced loans made by the RFC to the Railroad Company and others evidenced loans made by the Public Works Administration and acquired from that Administration by the RFC.

On June 7, 1946, the unpaid principal balance of these notes had been reduced to $2,611,619.10, such reduction having been effected by payments of income from and proceeds derived from the liquidation of the pledged collateral. On May 15, 1947, the unpaid principal balance of these notes had been reduced to $727,432.33 by means of further payments of income from proceeds derived from the liquidation of pledged collateral.

As most of the payments in reduction of these notes have represented income rather than proceeds of pledged collateral, the remaining obliga-

tion to RFC is fully secured, irrespective of the disposition of the issues raised by the petitions for certiorari. If the past is any guide to the future it is entirely reasonable to expect that payments on account of the collateral will operate to liquidate the notes completely in the comparatively near future and prior to the consummation of the reorganization of the Railroad Company.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JAMES L. DOUGHERTY,
General Counsel.
W. MEADE FLETCHER,
Chief Railroad Counsel,
Reconstruction Finance Corporation.

MAY 1947.

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No. 1369

Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER

of

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor.

INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS,

Petitioners,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FRED N. OLIVER
WILLARD P. SCOTT
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Dated: May 28, 1947.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondents* consist of substantially all of the secured creditors of the New Haven or their representatives,

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* Respondents comprise the following parties:

The Insurance Group; The Mutual Savings Bank Group; Bankers Trust Company, as Trustee of the Debtor's First and Refunding Mortgage; City Bank Farmers Trust Company, Trustee of the First Mortgage made by the Central New England Railway Company; Bank of New York, as Trustee under the Mortgage made by the New England Railroad Company; United States Trust Company of New York, Trustee of the Harlem River & Port Chester Mortgage; Irving Trust Company, Trustee of the Debtor's 6% Collateral Trust Indenture; Protective Committee for the Debtor's Boston and New York Air Line First Mortgage Bonds.

The principal Debtor, New York, New Haven & Hartford Railroad and the Old Colony Railroad Company Plan Committee.

the New Haven itself and the Old Colony Railroad Company Plan Committee. They have joined in supporting the provisions of the plan embodied in the Fifth Supplemental Report of the Interstate Commerce Commission,* imposing a ceiling on the obligations which the reorganized New Haven may assume for the use of the Boston Terminal property at South Station. These provisions have been approved on three occasions by the District Court for Connecticut and twice by the Circuit Court of Appeals for the Second Circuit without dissent.

Opinions Below.

Opinions of the District Court:

(i) opinion of December 21, 1943, approving the plan of reorganization embodied in the Interstate Commerce Commission's Fourth Supplemental Report with corrections, 54 Fed. Supp. 595;

(ii) opinion of March 6, 1944, approving the plan of reorganization embodied in the Fifth Supplemental Report of the Commission, 54 Fed. Supp. 631;

(iii) opinion of August 31, 1945, confirming the plan of reorganization embodied in the Fifth Supplemental Report of the Commission (not officially reported; printed at Stip. R. No. 11, p. 11891).**

Opinions of the Circuit Court of Appeals, Second Circuit:

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* The Fifth Supplemental Report and Order of February 8, 1944 is the one containing the plan of reorganization (Stip. R., No. 1, pp. 10831, 10872). The Sixth Supplemental Report of May 14, 1945 does not contain a plan of reorganization (though petitioners refer to it as so doing, Petition, pp. 1, 8), but explains certain findings in the former report not relating to the Terminal (Stip. R., No. 3, R., pp. 11682, 11703).

** Note: The Record Citations in this brief follow the system used by petitioners.

(i) opinion of January 2, 1945 upholding, with respect to the Terminal provisions, the plan of reorganization embodied in the Fifth Supplemental Report of the Commission, 147 Fed. (2d) 40;

(ii) opinion of January 13, 1947 approving the plan embodied in the Fifth Supplemental Report in all respects (not officially reported; printed at Stip. R. No. 15, p. 12655).

Jurisdiction.

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

Denial of Certiorari by This Court.

The provisions of the plan with respect to the Boston Terminal (South Station) of which petitioners ask review, are those embodied in the Commission's Fifth Supplemental Report. These are the same provisions of which review on writ of certiorari was sought by petitioners and others in May, 1945. This Court denied certiorari on these petitions in *Chapin et al.,** *as Executive Committee for Institutional Group of Boston Terminal Bonds* vs. *New York, New Haven & Hartford Railroad Company,* and *Commonwealth of Massachusetts, et al.* vs. *New York, New Haven & Hartford Railroad Company,* June 18, 1945, 325 U. S. 884. A rehearing of this denial was sought by petitioners and, in turn, denied on October 8, 1945, 326 U. S. 805.

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* On the present application, petitioners have styled themselves simply as "Institutional Group for Boston Terminal Bonds."

The Boston Terminal.

The Boston Terminal Company is the owner of South Station, Boston, the union station used by the Boston & Albany Railroad, the New Haven, the Old Colony and the Boston & Providence. The two latter lines were operated by the New Haven under lease prior to the institution of the New Haven bankruptcy proceedings in October 1935. Shortly after institution of those proceedings, that lease was disaffirmed and, under Court order, the properties were operated by the New Haven Trustees for the accounts of the respective lessors. On October 30, 1939, the New Haven Trustees were directed by the District Court to discontinue advancing cash to meet Terminal Company taxes and bond interest. This action by the District Court was affirmed by this Court (*Palmer* v. *Webster & Atlas Bank*, 312 U. S. 156 (1941). On November 3, 1939, proceedings were initiated for the reorganization of the Terminal Company in the District Court of Massachusetts and its properties are now in charge of a Trustee in bankruptcy. Subsequently, in the development of a plan in the New Haven proceeding, a provision was included designed to limit the cost of this facility to the reorganized New Haven System. This provision is in the form of an offer of modified terms for the use of the Terminal to be submitted to the Terminal Company Trustee for his acceptance or rejection. The offer, if accepted, would relieve the reorganized New Haven of the obligation to use the Boston Terminal and would limit the reorganized company's obligation to make payments on account of interest and principal of the debt of the Terminal Company, for so long as it shall use the property of the Terminal Company, to an annual amount obtained by applying to $275,000 (a little more than half of the present Boston Terminal bond interest), the per-

centage of the total use of such property from time to time by the reorganized company. The new terms are subject to the proviso that if there is a substantial increase in the use of the South Station the Commission will consider an increase in the permissible payment by the reorganized company. For a full statement of the facts relating to the Terminal and of the development of the provisions of the plan designed to place a limit on the cost of this facility, respondents respectfully refer to their brief dated June 12, 1945 in opposition to petitions for writs of certiorari submitted on the above mentioned applications (October Term 1944; Nos. 1315 and 1316).

The Boston Terminal Act.

The Boston Terminal Act, the relevant provisions of which are quoted in Appendix A to the petition, creates two distinct obligations, one to the Terminal Company and one to the Terminal Bondholders. The first is the obligation imposed on the railroads by Section 10 of the Act to pay, monthly, in proportion to use, whatever is currently necessary to meet the operating expenses of the Terminal, taxes and assessments and the interest on the bonds of the Terminal Company. However, neither the Terminal Company nor its Trustee, to whom this obligation is due, is a party to this application for certiorari. The second is the obligation imposed on the using railroads under Section 4 of the Act, under which they will be responsible for their pro rata share of any amount by which the principal and interest on the Boston Terminal Company bonds exceed the proceeds of the sale of the Terminal on foreclosure, as that amount is fixed and apportioned among the using railroads by the Supreme Judicial Court of Massachusetts. The petitioners are representatives of some of these bonds.

The Plan with respect to the Terminal.

The plan imposes a limitation only with respect to the first obligation above mentioned;—that to the Terminal Company.

On the submission of the offer by the Interstate Commerce Commission, the Terminal Trustee has the following courses open to him:-

(a) *Rejection:* If the Terminal Trustee does not consider the proposed payments acceptable, he may reject the proposal and exclude the using bankrupt roads from further enjoyment of the Terminal. In that event, he would have not only the control over the property but would become the holder of an unsecured claim against the New Haven for the damages suffered by reason of the abrogation of the obligation to use and pay a share of the cost of the Terminal and also an administrative claim, payable in cash, for the fair value of the use of the Terminal since October 30, 1939—the date when the New Haven Trustees stopped advancing cash for Terminal Company taxes and bond interest.

(b) *Acceptance:* If the Terminal Trustee accepts the proposal, the statutory obligation will be replaced by an obligation to meet a proportionate share of operating expenses, taxes and $275,000 per annum on account of principal and interest on the Terminal Bonds, and the Terminal Trustee's claim for breach of the statutory obligation will be waived. Acceptance will also settle the administrative claim for use since October 30, 1939, at an amount determined in accordance with the new basis for apportioning Terminal Company expense to the reorganzized New Haven.

(c) *Inaction:* If the Terminal Trustee neither accepts nor rejects the proposal during the period fixed by the Commission in its submission to him

> *and* does not file a claim for damages within two weeks following the period while the option is open, he thereby waives any claim for damages for breach of the statutory obligations of the Act against the Debtor and the other bankrupt roads who use the Terminal.

Neither rejection, acceptance nor inaction by the Terminal Trustee will, of itself, abrogate the rights of the Terminal Bondholders to establish their claim for the amount of any deficiency apportioned by the Supreme Judicial Court of Massachusetts against the New Haven. With respect to this claim, if it arises, they will receive the same treatment accorded to all other unsecured creditors, namely, a share of the common stock of the reorganized company as finally apportioned to them and reserved under Section J(17) of the plan which provides (Stip. R., No. 1, p. 10903):

> "(17) The common stock available for distribution to the holders of unsecured obligations and claims shall be distributed among them upon the basis of the relationship between the amount of each claim as finally allowed by the court to the total amount of all such claims. • • •.
>
> The Court shall determine at the time of consummation the amount of common stock necessary to be reserved for the satisfaction of claims not then liquidated and shall reserve the amount so determined for that purpose (any excess so reserved to be sold by the reorganization committee and the proceeds distributed in lieu of stock or scrip to the holders of the new common stock)."

Analysis of Petitioners' Position.

Petitioners ask the review of this Court on the basis of an alleged error in that the Terminal Bondholders were not accorded an opportunity to vote upon the plan as New

Haven creditors. Before answering this claim of error, respondents believe it desirable to point out the inherent conflict in which the Terminal Bondholders would be involved in so voting on the plan.

The Terminal Bondholders will be claimants against the New Haven as unsecured creditors entitled to a distribution of common stock. The sound reorganization of the New Haven, however, and the prospective value of these shares depends in part upon making the reduction of the charges for the use of the Boston Terminal properties effective. It follows, therefore, that normally the general creditors of the New Haven, with whom the Terminal Bondholders would vote, would be in favor of the plan which accomplishes this reduction in Terminal charges. But if the Terminal Bondholders could have been accorded the vote for which they argue, it seems probable that they would have been influenced more by their position as owners of the Terminal bonds, opposed to the reduction of the payments to be made by the reorganized company, than as unsecured creditors of the New Haven. While this inherent conflict is not the reason why petitioners were not allowed to vote, it does show plainly that petitioners' complaint is not of any denial of their voting rights as potential New Haven creditors but, in reality, constitutes an indirect attempt, in the guise of New Haven parties, to upset terms of the plan that are necessary to the sound reorganization of the New Haven.

The reservation of common stock for issue in satisfaction of the unsecured claims of the Terminal Bondholders for the possible deficiency places them on a par with the other New Haven unsecured creditors. Under the reduced capitalization which the Commission has found that the reorganized New Haven can support, common stock is all that is available for issue to the holders of unsecured claims. The Terminal parties have offered no criticism of this award to claims of this class.

ARGUMENT.

POINT I.

The confirmation of the plan without a vote by the Boston Terminal Company or the Boston Terminal Bondholders was in accord with the statute.

A liability to the Terminal Bondholders, for any deficiency arising on the foreclosure of their mortgage of the Terminal property under Section 4 of the Boston Terminal Company Act, has yet to come into existence. As provided in that Section, the New Haven and the other railroads which use the Terminal will become liable for such deficiency, if at all, only when and if there is a foreclosure, and if a deficiency occurs at the foreclosure sale, and then, only when the amount thereof has been apportioned among them by action of the Supreme Judicial Court of Massachusetts. The claim which is to be finally determined by such apportionment is the claim which the Circuit Court of Appeals held had not been allowed and could not be liquidated and allowed prior to submission for a vote without undue delay (Stip. R., No. 15, p. 12682).

Petitioners contend that by the District Court's Order No. 45 this claim has in fact been allowed or, in the alternative if such is not the case, that the claim should, as a matter of law, have been allowed before submission of the plan to creditors for voting.

Order No. 45 relating to the filing of claims in these proceedings recognizes the contingent nature of this liability. It did not purport in any way to allow a claim of the Terminal Bondholders. Paragraph 41 of the Debtor's Petition for Order No. 45 recites that the Debtor, with the other railroad companies, "is liable to pay any deficiency following foreclosure of the mortgage" in accord with the Boston Termi-

nal Company Act (see Appendix C to Petition). While petitioners stress Paragraph 3 of the order, that, in fact, provides only that no further claim need be filed with respect to the Boston Terminal mortgage and that, in the absence of protest, the aggregate amount of the bonds secured by the Terminal mortgage will be taken as correct (Paragraph 6). Paragraph 7 of this order, moreover, provides that (Stip. R., No. 20, p. 9):

> "7. That nothing contained herein shall constitute a determination of the nature or extent of the liability of the Debtor upon any claim now or hereafter filed hereunder, or upon any guaranty, endorsement, or other contingent obligation nor shall constitute the allowance by the Court of any claim against the Debtor. . . ."

By express provision of Order No. 45, that order does not operate as an allowance of the Terminal Bondholders' claim. Indeed, as the Circuit Court pointed out, it is difficult to perceive how there could be an allowance of such a claim by the District Court which has no jurisdiction over foreclosure of the property or power under the Boston Terminal Company Act to apportion any deficiency among the using railroads.

In connection with Order 45 and their status in these proceedings, the petitioners confuse the fact that they are creditors under the very broad definition of creditors in Section 77 with the isolated problem of allowing them to vote. There is no dispute that $15,500,000 of Terminal bonds are outstanding. Paragraph 6 of Order 45 admits this. It is not disputed that if there is a deficiency on the Terminal foreclosure, there will be a claim against the debtor. It is not disputed that the Terminal bondholders are potential creditors to that extent. But this does not

mean that they may vote, for, under the Statute, only a particular class of creditors may vote: those whose claims have been filed and allowed.

Despite the complete contingency of the claim of the Terminal Bondholders, it is not destroyed or disallowed by the plan. Under the provisions of Paragraph J(17) of the plan, quoted in the preliminary statement above, common stock of the reorganized company is reserved pro rata for issue in satisfaction of all unsecured claims including those of the Terminal Bondholders, if they ever arise.

Any liability to the Terminal Trustee will arise only in the event that the proposal in the plan for a reduction in the payments for the use of the Terminal is rejected by the Terminal Trustee and he elects to rely upon his claim for damages for breach of the obligation to use the Terminal imposed by the Act. In that event, he will receive common stock for his damage claim pursuant to Paragraph J(17) of the plan and cash for his administrative claim pursuant to Paragraphs L and N(4)* of the plan.

With respect to voting on an approved plan, Section 77(e) of the Bankruptcy Act provides:

> "The plan [after approval] shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirement of subsection (c) hereof * * * " (Bracketed insertion supplied.)

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* These provisions of the plan seemed clear to respondents. In response to questions raised by petitioners in regard to them in the Courts below, however, the District Court and the Circuit Court of Appeals construed them favorably to the petitioners. They now complain, that in so doing, the Courts have usurped the functions of the Commission (Petition, p. 10). In the light of the provisions of Section R of the plan, that it may be construed by the Court and that such construction shall be final, the force of the petitioners argument is hard to appreciate (Section R of the plan is at Stip. R, No. 1, p. 10921).

The above provision of Section 77(e) of the Bankruptcy Act is clear that a creditor, in order to be a voting creditor must be the holder of a claim which is both filed and allowed. The wisdom of this double qualification is made obvious in the present case. If the petitioners' claim is to be admitted to vote without allowance, it will be impossible to say what weight is to be given to their vote in the absence of any evaluation of the claim in dollars. Certainly, it would be most unfair to the other unsecured creditors of New Haven to admit this claim, which is wholly unknown in amount, to voting as a part of their class. Nor would the Terminal Bondholders themselves have an adequate basis on which to vote until they knew the amount of their claim and the resulting amount of new common stock they will be entitled to receive.

It would have been clearly unfair to admit the Terminal Bondholders to vote on the basis of a constructive allowance of the full principal amount of the outstanding bonds, where the amount actually represented by their claim is, as yet unascertained. The cases upon which petitioners rely as an indication that the courts below have erred in failing to allow them to vote as if the holders of a $15,500,000 deficiency wholly apportioned against the New Haven, concerned direct obligations presently in existence but possibly uncertain in final amount.* No question of voting upon a constructive allowance of a claim was involved in these cases. All that they may be taken as declaring is that in reorganizations, various classes of contingent claimants

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* Among the cited cases, are *City Bank Co.* v. *Irving Trust Company*, 299 U. S. 433 (1937); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 453 (1937), and *Connecticut Ry. Co.* v. *Palmer*, 305 U. S. 493 (1939). They involved claims of lessors upon disaffirmance of leases where the lessee is directly obligated to perform all the covenants of the lease.

are to be treated as creditors. That is not an issue, however, between petitioners and respondents, for the petitioners have been treated as creditors, save for the purpose of voting which, under the Statute and as a practical matter, was impossible. The cited cases also have the distinguishing feature, that they involve direct liabilities, whereas the liability to the Terminal Bondholders is at most, an agreement of indemnity. The cases do not bear upon an agreement of indemnity like the present one where no liability is presently in existence and where a claim will only come into being when the potential claimant has satisfied a condition precedent.

There is nothing in the *Akron* case (*In re Akron, Canton & Youngstown Rwy. Company,* 117 Fed. (2d) 961 (C. C. A. 6) (1941)) or in this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande, Western Railway Company,* 328 U. S. 495 (1946), or *In re United Cigar Stores Co.,* 73 Fed. (2d) 296 (C. C. A. 2nd) (1934) cert. den., 293 U. S. 708 (1935), cited by petitioners, which bears upon a wholly contingent liability like that which may ultimately accrue to the Terminal Bondholders. In the *Akron* case both the Akron, Canton & Youngstown Railroad and the Lake Erie & Western Railroad were directly and primarily liable for the obligation of the bonds which had been guaranteed. The *Denver* case involved the disposition of additional collateral for regularly outstanding bonds of the Denver Railroad. In respect to these the Denver was directly and primarily liable. The *United Cigar Stores* case involved the obligation of a note. All these cases have in common a direct obligation of a definite maximum amount whereas in these proceedings, there is no ascertainable amount until the deficiency, if any, has been determined and apportioned.

Not only does the Act under which this claim is made require a determination of the Terminal Bondholders' claim in a particular way—through action by the Terminal Bondholders in the Supreme Judicial Court of Massachusetts—but it requires little imagination to see, that if this process had been attempted by the Connecticut District Court or the New Haven parties at any time up to the present, it would have been met with vigorous opposition on the ground that it was an attempt to prejudge the Terminal parties' constitutional argument against the effectiveness of the plan to alter the statutory obligations of the Boston Terminal Act.

Section 77(e) of the Bankruptcy Act does not give the District Court any power to withhold the voting on a plan until such time as a tardy creditor has put himself in a position to vote on an allowed claim. Rather, the Act directs the Court, upon approval of a plan, to file a copy of his opinion with the Commission, whereupon the plan "shall then be submitted to the creditors of each class". This offers no authority for further delay to allow for proof of claims not ready for allowance.

Section 57(d) of the Bankruptcy Act authorized the action of the District Court in confirming the plan without awaiting liquidation of the Terminal Bondholder's claim. As the Circuit Court pointed out, other provisions of the Bankruptcy Act, ancillary to those relating to the reorganization of railroads under Section 77, are applicable to railroad reorganization proceedings insofar as not inconsistent with that Act. Section 77(l) so provides. Apparently recognizing that there is nothing in Section 57(d) as applied by the Circuit Court which is inconsistent with Section 77, petitioners attempt to avoid the effect of its application by a process of construction. They assert

that if Section 57(d) applies, then certain other sections of the Act must also be taken as applicable and, in turn, if these sections are applied, an inequitable result will follow. The sections of the Act which they claim are thus brought into play are Sections 63(d) and 17. If, however, these are clearly inconsistent with Section 77, they are inapplicable under the Terms of Section 77(l).

Since Section 63(d) denies the provability of contingent claims, its inconsistency with Section 77 is immediately apparent, as the latter section makes all contingent claims provable and dischargeable in proceedings under that statute and requires that such claims be provided for (77(b)). Section 17 provides that a discharge in bankruptcy shall release the bankrupt from his provable debts. This is not inconsistent with Section 77, for under Section 77, petitioners' provable claim must be provided for in the plan (as it has been) and may be discharged. There remains thus, the wholly consistent provision, Section 57(d), upon which the Circuit Court relied in holding that these proceedings need not have been held up to await the pleasure of the Terminal Bondholders and the Massachusetts District Court and the Supreme Judicial Court of Massachusetts in foreclosing the mortgage and allocating liability.

It must be remembered that there has been default in the payment of all or part of the sums due to the Terminal Company and due from the Terminal Company to the Terminal Bondholders under the Terminal mortgage since the entry of the District Court's order directing the withholding of interest and tax payments in October 1939. Despite this lapse of time there has been no foreclosure. While a petition for leave to foreclose was finally filed in September 1945 in the District Court in Massachusetts which is charged with the administration of the Boston Terminal's bankruptcy, that Court has refused to permit the proceed-

ings to go forward to a sale without concurrence of the Interstate Commerce Commission. In the acceleration of this process the Connecticut District Court could take no part. The Terminal proceedings in Massachusetts are not within its jurisdiction, as the Circuit Court here pointed out.

POINT II.

These proceedings have been open to the Terminal Company and to the Terminal Bondholders since their inception. They have chosen to ignore the many opportunities afforded them to participate in shaping and formulating the plan and, instead, have argued that the plan could not affect them.

The Boston Terminal parties have had many warnings emanating from the Commission and the District Court* that a plan might affect their interests by modifying the obligations with respect to the Terminal and ample oppor-

* See remarks of Division 4 of the Commission on the possibilities of tax reduction in Report of Division 4 of the Commission (D. R., p. 7920); the remarks of the Commission in its First Supplemental Report, holding the Boston Terminal charges responsible for a large part of the Old Colony deficit (D. R., pp. 8057, 8060).

The District Court's opinion of December 8, 1941 reviews the situation of the Terminal and remarks, regarding the proposal of a committee appointed to consider ways of reducing the Old Colony losses as follows (D. R., p. 8959):

> "If the participating debtors are to have relief, it must be contained in the plans for their reorganization. * * * Is there any special equity which entitles the Terminal bondholders to immunity from the onslaughts which time and changing conditions have wrought upon the great bulk of the capital invested in this enterprise?
>
> To meet this situation the report of the Compromise Committee suggests appropriate modifications of the charters of the debtor railroads whereby a ceiling is imposed upon the amounts they shall be obligated to pay to the Terminal Company."

tunity to participate in shaping and formulating such a plan.*

The participation of the Terminal Bondholders, save for an attempt, late in 1942, to offer some proof as to the value of the Terminal after the Commission had made its Third Supplemental Report, has been by assertion that no New Haven plan could legally affect the obligations due the Terminal Company under Section 10 of the Boston Terminal Act. This obligation, they claimed, was inviolable. The District Court has described the position which the Boston Terminal interests have taken up to the time when, after

* The following major events in the New Haven proceedings put the Boston Terminal and the Boston Terminal bondholders on notice of these proceedings and of the likelihood that a plan of reorganization for the New Haven and Old Colony would probably deal with the obligations imposed under the Boston Terminal Acts:

1. March 13, 1936—Notice by publication of the pendency of these proceedings similar to that given all New Haven and Old Colony creditors in pursuance of the District Court's Order No. 45 (D. R., p. 447).

2. October 17, 1939—Intervention, specially, by the Trustee of the Boston Terminal bonds in opposition to the withholding of the payment of Terminal taxes and interest on the Terminal bonds by the New Haven Trustees. The affirmance of the District Court's Order permitting this suspension of payment by this Court in February, 1941 gave notice that the plan of reorganization might deal with these charges.

3. December 7, 1939—General intervention in these proceedings by the Trustee in Bankruptcy of the Boston Terminal Company before the Interstate Commerce Commission.

4. December 8, 1941—Opinion of the District Court calling attention to the need for a reduction in the Boston Terminal costs and commending a report of a Compromise Committee making a proposal for such reduction.

5. January 27, 1942—Notice by mail to the Boston Terminal Company and notice by publication, similar to that given all New Haven and Old Colony creditors, to the other Boston Terminal parties of hearings to be held before the Commission, beginning February 17, 1942 relative to the matters discussed in the District Court's opinion of December 8, 1941.

the plan in this regard had been fully worked out before the Commission, they sought to offer evidence before the District Court relating to the value of the Terminal facility, thus (D. R., p. 10760):

> "In the light of such considerations, it will be seen that the allowance of a reopening under such circumstances will frustrate a cardinal legislative objective—expeditious reorganization. If such practice shall have sanction, parties may safely stand outside the proceedings—just as was done by the Terminal interests in these proceedings—free to accept the product of the Commission's labor if they like it, otherwise to insist that the Commission (and all the other parties) shall begin their laborious task anew."

As noted above, the petitioners have confused their right to be treated as creditors with a single aspect of a creditor's right, that of voting. It is not disputed that the Terminal and the Terminal Bondholders are creditors, under the broad provisions of Section 77. As such, they have had every right with respect to the development of the plan which all the other New Haven creditors have had. The proceedings have been open to their participation and for their collaboration in the development and shaping of the plan. They withheld such participation until it was too late. Now, solely on the basis of the failure to permit them to vote, a right which we have shown the Court below could not have given them, they claim they have been denied all of the rights of creditors.

POINT III.

The procedure adopted by the Commission and the Courts below for dealing with the Boston Terminal problem follows a method approved by this Court.

While we believe this and the following point have been already decided by this Court in its prior denial of certiorari (*Chapin et al.* v. *New York, New Haven & Hartford R. Co.*, 325 U. S. 884), we repeat them here because we believe the petitioners' real objective is to reopen them.

The petitioners cannot dispute the adequacy of the proof of the disproportion between the cost of operating the Boston Terminal and the revenue derived from that facility. We need not burden the Court with a statement of the record in this regard. It should suffice to say that the costs of the Terminal account for 70% of the average fare paid by commuting passengers using the Terminal, leaving less than a third of the fare paid to cover the costs of the passenger's transportation to his destination.* This, and much other evidence support the findings of the Commission that the annual cost of the Terminal was far in excess of the worth of this facility and that modification of the terms for its use was imperative.

In the *Milwaukee* proceedings a somewhat similar situation with respect to the outstanding bonds and the lease of the Chicago, Terre Haute and Southwestern Railroad Company, a leased line of the Milwaukee, was presented. While the Terre Haute lines showed a favorable result on segregation of earnings, the Commission concluded that the annual rental (which provided for service of the out-

* D. R., page 9784.

standing Terre Haute bonds) of more than $1,000,000 was disproportionate to the greatly reduced fixed charges which the reorganized Milwaukee was to be permitted to assume. It, therefore, approved a plan which offered the Terre Haute and the Terre Haute Bondholders a reduced rental as an alternative to disaffirmance of the Terre Haute lease. Of this proposal, this Court said (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 318 U. S. 523 (at p. 546)):

> "It is pointed out that the modifications proposed by the Commission for these four classes of bondholders are to be made regardless of the lien, security, interest or maturity of each and the earning power of the respective underlying properties. Hence it is argued that this phase of the plan is not fair and equitable, since it does not even attempt to preserve the respective priorities of these bond issues. The short answer to that objection is that the Terre Haute properties have not been treated by the Commission or the District Court as a part of the properties of the debtor for reorganization purposes. Nor has any question been raised or argued here as to the power of the Commission or the District Court so to treat them. The Commission and the District Court considered the problem solely as one of rejection or affirmance of a lease. The Terre Haute bondholders were in effect given the option to take the Terre Haute lines back or to agree to a reduced rental. If the Commission had authority to determine the question of rejection in the manner indicated and if it complied with the legal requirements for the exercise of that authority, the modifications which it proposed and which the District Court approved are valid. We think they are."

The same procedure with respect to the Salt Lake Western Railroad, a subsidiary, was adopted in the *Denver* reorganization, the plan for which was upheld in *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495 (1946).

The New Haven plan offers a similar option to the Terminal Trustee in bankruptcy. This officer has discretion, subject to authorization of the Massachusetts District Court and, as a practical matter, to consultation with the Terminal Bondholders, whether or not to accept the offer. With respect to the right of the Trustee to accept or reject the offer there can be no application of the "cramdown" provisions of Section 77(e) of the Bankruptcy Act. The present procedural question, regarding voting of the Terre Haute interests on a proposal made in the plan, as an alternative to rejection of the Terre Haute lease, was raised in the District Court in the *Milwaukee* reorganization and a procedure like that followed here was approved *(In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 36 Fed. Supp. 193, 209 (1940)). Though the Terre Haute interests appealed, they did not argue the point in the appellate courts.

The petitioners charge that the making of the offer to the Terminal Trustee was deliberately delayed to their prejudice. It is quite the contrary of the attitude which they adopted in the District Court when the plan was before that Court for approval. There they contended (see D. R., pp. 10970-10971) that the procedural vice of the plan was that the offer would be presented to the Terminal Trustee for acceptance or rejection before a court of last resort had an opportunity to decide that the provisions of the Terminal Act were not beyond the reach of the Court and Commission in these proceedings. The District Court

recognized this difficulty and construed the plan as not requiring the submission of the offer until after confirmation of the plan (see D. R. 11034-11036). Until confirmation of the plan, the offer could have been legitimately rejected by the Terminal Trustee on the ground that it was premature and that he was being asked to commit himself on the offer, though the New Haven parties were not then committed to the plan.

The plan was confirmed on September 6, 1945. The petitioners complain that the offer was not then and there submitted to them. However, from that date up to the present, petitioners have been actively litigating the legality of the Boston Terminal features of the plan—raising questions not related to the merits of the offer as an expression of the value of the Terminal to the using railroads. Had the offer been then submitted, the Terminal Trustee would have been bound to return it as again premature, as the largest group of bondholders in his reorganization proceedings were still contesting the legality of the plan and he could therefore not be asked to consider the offer on its merits without, at the same time, taking a step which might prejudice the litigation then in progress.

There is no "conflict between circuits" raised by the decision in *Consolidated Power Company* v. *United Railways Co.*, 85 Fed. (2d) 799 (1936), cert. den. 300 U. S. 633 (1937), and the decision of the Circuit Court herein with respect to the offer procedure (Petition, pp. 27, 28). The opinion in the *Consolidated Power* case expressly authorizes the reservation of the question of disaffirming an executory contract as a part of a plan so long as provision is made therefor in stock, as in the present plan (85 Fed. (2d) 799, 803). The difficulty with the Consolidated Power plan was that it neither accepted nor rejected the contract in the

plan and made no provision for the rights of the holder of the executory contract, if disaffirmed. The New Haven plan, in sharp contrast to the plan there disapproved, has not only offered every opportunity for participation by the Terminal interests, but has also provided the best treatment possible for these inchoate claims having regard to the available New Haven assets.

POINT IV.

Section 77 of the Bankruptcy Act permits the modification of obligations imposed by state statutes through a plan of reorganization.

In re New York, New Haven & Hartford R. Co., 147 F. (2d) 40, C. C. A. 2 (1945); cert. den. *Chapin et al.* v. *New York, New Haven & Hartford R. Co.*, 325 U. S. 884 (1945);

New York v. *United States*, 257 U. S. 591 (1922);

Palmer v. *Massachusetts*, 308 U. S. 79 (1939);

Texas v. *United States*, 292 U. S. 522 (1934);

In Re Missouri Pacific Railroad Company, 39 Fed. Supp. 436 (1941).

Conclusion.

The petition should be denied.

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